

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent Application of:
David Shaver et al.

Application No.: 10/789,444

Confirmation No.: 5009

Filed: February 27, 2004

Art Unit: 3643

For: GROWING VINED PLANTS

Examiner: S. T. Nguyen

APPELLANT'S RESPONSE TO EXAMINER'S ANSWER (37 CFR 1.193(B))

MS Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
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ATTENTION: BOARD OF PATENT APPEALS AND INTERFERENCES

As required under § 41.41(a)(1), this Reply Brief is filed within two months of the Examiner's Answer dated August 23, 2006, and is in furtherance of the Appeal Brief filed on June 5, 2006.

No fee is required for this REPLY BRIEF.

This brief contains items under the following headings:

I.	Remarks
II.	Conclusion

I. REMARKS

A. The Guinness Time (*Hop*)

Appellee continues to assert that the Guinness Time is a newspaper dating back to 1958. *See* Examiner's Answer at 4. However, Appellee has failed to provide any evidence to support such an assertion. Thus, Appellant maintains that, without corroboration, these are mere allegations and lack any substantive evidence. *See* Appeal Brief at 4.

Appellee relies upon an example of having a difficult time finding the first issue of *Time* magazine so as to somehow equate *Time* magazine with the Guinness Time mentioned in *Hop*. *See* Examiner's Answer at 4. However, Appellant asserts that this argument is without merit. While it may be difficult to find an original copy of *Time* magazine, it is not impossible to find something that corroborates its standing as a published magazine, and thus a printed publication for purposes of 35 U.S.C. § 102(b). Appellee cannot make such a showing with respect to the Guinness Time. While one would know that *Time* is a magazine and one could ascertain information about its date of first publication and/or extent of readership, the same may not be said for the Guinness Time. The Guinness Time is not a medium with which the general public is familiar, and a search of the Internet does not turn up any mention as to which genre of media that the Guinness Time belongs – a newspaper or other published medium. *See* Appeal Brief at 5. Appellee can provide no support for the existence of the Guinness Time other than the one mention in *Hop*, and contrary to Appellee's assertions, even there, no mention of the Guinness Time being a newspaper is made. Although there is a picture of what is purported to be the Guinness Time on the *Hop* website, this in no way proves that the Guinness Time is a newspaper or other published medium as Appellee asserts. *See* Examiner's Answer at 5. There is simply no corroboration for Appellee's statements that the Guinness Time is a newspaper, and thus, Appellee cannot make the required showing to prove that the Guinness Time is a printed publication purposes of 35 U.S.C. § 102(b).

Further, the only corroboration for Appellee's assertion that the pages of the Guinness Time referenced in *Hop* date back to 1958 are titles that the website creator himself apparently has associated with the various Guinness Time images depicted on the *Hop* website. There is no identification of a creation date on any of the Guinness Time pages that

conclusively proves or even corroborates the date of alleged public posting. Thus, there is no corroboration other than website-created titles for Appellee's statements that the Guinness Time necessarily dates back to 1958. In the absence of such corroboration, Appellee is left to rely upon the date that *Hop* was first placed on the Internet as the publication date for the Guinness Time medium, which is after Appellant's filing date. Accordingly, *Hop*, in the form provided by the Examiner, may not be considered prior art to Appellant's invention as the date of publication falls after Appellant's filing date.

Also, Appellee continues to rely on an argument that Keith Ennis, the creator of the *Hop* website, is allegedly an average "joe" interested in hop growing who was able to obtain the newspaper. *See* Examiner's Answer at 4. Again, this is not the test for determining whether *Hop* is a proper § 102(b) printed publication, and Appellee cannot show otherwise. Therefore, Appellee has not demonstrated that *Hop* is a proper § 102(b) printed publication, and accordingly, claims 1, 3, 4, and 6-9 should be rendered patentable.

B. *Tillinghast* Reference

Appellee has stated that *Tillinghast* was cited to "demonstrate that Appellant's invention is not patentable because, in addition to the Hop article, *Tillinghast* also teaches the method of growing plant as claimed." *See* Examiner's Answer at 5. Appellant maintains that Appellee has failed to state proper grounds of rejection based on *Tillinghast* for the reasons previously stated. *See* Appeal Brief at 6; *see also* M.P.E.P. § 707.07(d). Thus, Appellee's rejection based on *Tillinghast* should be withdrawn.

Regardless whether the rejection is deemed proper, Appellant maintains that *Tillinghast* in no way anticipates or renders obvious Appellant's invention. Specifically, *Tillinghast* fails to teach or suggest a method for growing a plant comprising the step of "twisting at least two plant vines of said plant together to form a growing unit" as recited in claim 1. While *Tillinghast* discloses the training of branches around a stake (column 1, lines 14-19), these branches are not twisted together to form a growing unit. Rather, *Tillinghast* merely describes that the branches are allowed to grow in a manner such that they are trained spirally around the stake (column 1, lines 12-15). Similarly, *Tillinghast* fails to teach or suggest all limitations of claims 6 and 9, namely "twisting at least two plant vines of said

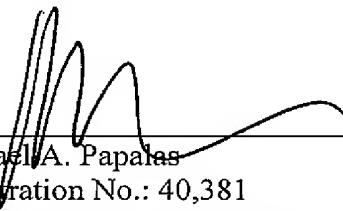
plant around a flexible material" and "attaching at least a pair of said plant vines to one another with a flexible material, wherein said at least a pair of said plant vines are twisted together around said flexible material" as *Tillinghast* specifically discloses the branches being trained around a stake and not a flexible material. Further, *Tillinghast* teaches away from use of a flexible material by stating that the mode of training disclosed is allegedly better than "when the vines are tied with strings." See column 2, lines 10-13. Thus, *Tillinghast* fails to teach or suggest all limitations of the claims, and accordingly, claims 1-10 should be rendered patentable over the cited art.

II. CONCLUSION

Appellant believes that each of the pending claims is in condition for allowance, and respectfully requests that the rejections of record be overturned.

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Respectfully submitted,

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